controversy is interesting. It strikingly illustrates the propriety of cities and towns taking the precaution, *on the face of the grant,* to reserve the right to repeal and retract these privileges.

It also furnishes another instance of the rapidity with which the Federal Courts, on one ground or another, are eating away the autonomy of the States.

R. G. H. KEAN.

THE DEEDS OF TRUST PUZZLE: A LEGAL PARADOX.

Some years ago a question was mooted in the *Virginia Law Journal** as to the priority of liens on a fund, where the recording or non-recording of a deed, or the docketing or non-docketing of a judgment, made a singular conflict; which resulted in what might be called a legal paradox. My attention was called to it at that time, and subsequently; and my conclusions were in accord with those of a very learned and able lawyer, Col. Edmund Pendleton, who based his opinion on a decision of Chief Justice Beasley in *Hoag v. Sayre,* 6 Stewart's (N. J.) Reports (33 N. J. Eq.), 552, decided in 1881.

It seemed to me the confusion arose from a lack of precision in the views taken as to the status of the conflicting claimants under the registry laws as to deeds and judgments.

At the request of a friend, I venture to offer my thoughts on this legal puzzle.

The doctrine of notice, and the effect of the recording acts as to deeds and of the docketing acts as to judgments, enter into the solution of the problem.

Equity has always protected its peculiar rights and titles, called "equities," by holding that the purchaser of a *legal* title, with notice of an equity, takes subject to that equity; and that a judgment lien on land is subject to an equity attaching to the judgment debtor in respect to such land.

But the cases now proposed to be considered are cases where *legal* titles are by the recording and docketing acts made void as to purchasers for value without notice, and as to all creditors. As to such legal titles, except under said acts, notice is immaterial; and the subsequent

* See 5 Va. L. J. (Aug. 1881), 528; 12 Va. L. J. 360; 424; 487.

purchaser cannot divest the prior legal title. For if he had *no notice* of it, both stand on their respective deeds purporting to convey legal titles; and if he had notice, he can claim neither at law nor in equity.

Again, it must be borne in mind that the registry laws do not avoid absolutely a deed because unrecorded, nor a judgment because undocketed; but only as to a purchaser for value without notice, who was or might be deceived thereby; and also as to creditors in respect to the unrecorded deed. It is good as to all others. These laws must be so construed as to invalidate such deeds and judgments as to purchasers who had no notice, and validate them as to all who had. This can only be done by making the holder of the unrecorded deed or undocketed judgment yield the benefit he would derive therefrom to him only as to whom it is made void, but without any right on his part as to whom it is held valid to the benefit which is so surrendered to the party, as to whom it is made void by the registry laws.

With this preliminary, let us take this case—

1. O having legal title to Blackacre conveys it to A. by deed of trust to secure debt (a). A fails to record his deed of trust.

2. O conveys same land to B by deed of trust to secure debt (b). B records his deed of trust, but *with notice* of A's deed.

3. O conveys same land to C by deed of trust to secure debt (c). C records his deed of trust *without notice* of A's *unrecorded* deed, but with constructive notice of B's recorded deed.

By A's deed of trust he holds the *legal* title to secure his debt. A's title is valid against B, because though A's deed was unrecorded, B took the equity of redemption with notice of A's legal title. A has law and equity in his favor, and B has only an equity. A must prevail over B. As between them A can take his debt (a) out of Blackacre (call the fund from it x), and B can only get his debt out of (x—a). This is clear.

But A's deed of trust is void as to C, because unrecorded, and because C had no notice; but B's deed of trust is valid as to C, because prior in time and duly recorded; and hence C must leave intact all of B's right; which is a right to take what remains after A takes his debt (a) out of the fund (x). In other words, B must get his debt (b) out of (x—a). B cannot touch the fund (x) to the extent it is needed to pay A's debt (a).

What primary right then has C? None whatever to B's prior claim to take his debt (b) out of (x—a); that is out of what remains of the fund after (a) is deducted. But after (a) and (b) are deducted, C by

virtue of his deed, which is subject to B's prior deed, can get his debt (c) if anything remains; that is, if (x—a—b) amounts to anything, C may take it to pay his debt (c).

But C has a further right. A's deed of trust is void as to C. It must stand aside for C. A's right to his debt (a) cannot avail against C. C is put into A's place as far as A's right to take his debt (a) interferes with C's right to his debt (c). A forfeits his place and his right to C. Hence to the amount of debt (c) A must yield the fund to C, even though it takes all of debt (a); if it takes but a part, A has the residuum; and when A's debt is fully satisfied, there remains (x—a), out of which B may get his debt (b).

Now comes the difficulty. B protests that, if a equals x, then x—a will be nothing; and the result will be that C, who took his deed with notice of B's, will have his debt preferred to B's, which was prior in time, and of which C had full notice.

Several answers avail against this protest.

First—Can A complain of this result? Clearly not. For as his deed is void as to C, every cent he would get is justly C's.

Can B complain? Clearly not. C can say to B, "Friend, I do *thee* no wrong; your right was to get your debt (b) out of (x—a)—that is, out of the original fund, after A's debt (a) is deducted. You have no right and never had any to a cent of (a). Your claim is to (x—a)—that is, to the original fund, *after* (a) is deducted." C takes not a cent of (x—a), which is all B has a right to. C only takes out of (a), to which B has no right, and to which A has no right, because his right to it is void as to and in favor of C.

Second—If C be not entitled to his debt (c) out of A's debt (a), who is? A cannot be, for his deed is void as to C; and if A takes (a) out of (x) and keeps it, then his deed would be *valid, not void*, as to C, which would make the statute of records a nullity.

But B cannot be entitled to take his debt (b) out of (a); for A's right is *valid* as to B; and if B took his (b) out of A's (a), A's deed would be *void*, not valid, as to B, which also would make the statute of records a nullity. This is *reductio ad absurdum*.

Third—But still it may be insisted that as C took with notice of B's deed, C should yield to B all C gets from A.

But it is obvious that if C is to be held a mere conduit for the transfer to B of what A yields to him, then the result would be that B's deed, void as to A's deed because B had notice of it, would become

valid as to A, merely because C's after deed is *void* as to B. How can B's *void* deed be made valid by C's subsequent deed? It is absurd.

But the test is this: C takes nothing which B had right to when B took his deed. C took subject to B's right, which was itself subject to A's. C took A.'s right, to which B's was subject, because A's right was void as to C, and valid as to B. B never had any right to (a) at all. B had right to (x—a), but none to (a). C had full right to (a), but none to (x—a) until B was paid his debt (b). The pivot of contest is as to (a), to which B had no right; but to which A had primary right, forfeited by A to C, because A's right was void as to C, though valid as to B.

A's deed is absolutely valid as to B, and is as if B's deed did not exist.

A's deed is absolutely void as to C, and C takes what A had primary right to, under his deed, as if A's did not exist. The law thus makes C *quasi* assignee of A's right.

C's *primary* right under his deed is subordinate to B's. But C is by law promoted to the place of A, takes A's right by substitution and *quasi* assignment, and thus is preferred to B; not by taking away any right of B, but by taking A's right, which was always paramount to B's right, and which *the law* gives to C.

To state the case circumstantially: Let x = the fund; and let (a), (b) and (c) represent the respective debts of A, B and C.

A *tentatively* takes (a) out of (x) and leaves (x—a) for B.

B takes (b) out of (x—a), *not* out of (x).

C takes (c) out of (x—a—b).

But as A holds (a) paramount to B, and subordinate to C, he pays over (a) to C, or so much as is needed to pay (c), after (x—a—b) is exhausted. If only part is needed, A retains what remains.

The application of this algebraic illustration to numbers will produce some curious results.

(1.) Let x = $5,000; and let each claim be $5,000. Then A gets, tentatively, $5,000. But (x—a) = 0; so B gets nothing; because A's right is as to him paramount. And C by original or primary right gets nothing; for (x—a—b) = 0. But C asserts his right against A's primary claim, which is void as to him; that is, A can take *all* as against B, but *nothing* as against C. Hence C takes from A his $5,000, leaving him with nothing; C gets his whole debt, and A and B get nothing.

(2.) Let x = $10,000, and let each claim be $5,000. A gets

tentatively $5,000. B gets $10,000—$5,000=$5,000. C gets by original right $10,000—$5,000—$5,000=0. But C takes A's place. Hence A gets nothing, and B and C get their whole debt.

(3.) Let x=$12,000; and let each claim be $5,000. (x—a)= $7,000. Out of this B gets $5,000, his whole debt. (x—a—b)= $2,000, which C gets by original right; but by assailing A, C gets $3,000 more, making his whole debt, and leaves A but $2,000.

(4.) Let x=$3,000; and let each claim be $5,000. (x—a)= —$2,000. Hence B gets nothing. A gets the whole fund, which he must yield to C. Hence C gets $3,000 of his debt, and A and B get nothing. Can either complain? Can A, that the law for his laches forfeits his right to C? Or B, because C gets from A what B could never get, and had no shadow of right to?

This solution of the puzzle may be confirmed in the case supposed by another view:

A has the *legal* title *plus* his *equity* to secure his debt. B has only an equity of redemption to secure his debt; and so also has C. Now, A's legal title is *valid* against B, for B had notice of it. It is *void* as to C, for he had no notice.

The law gives C the legal title of A, and thus he has the legal title, by act of law and not by contract, clothed with an equity superior to B's, because prior in time, and of which B had notice. C has law and equity on his side, and B only an equity. Besides, as we have shown, C does not take anything from B, but really takes what A had primary right to, and to which B is absolutely subordinated; and thus C has superior equity to B, and the law on his side. Hence his claim is in no way open to the criticism so often made on the doctrine of tacking; for he does not *squeeze out* B, but leaves to him all his right, while he takes only that of A (to which B's is subordinate), which the law avoids in C's favor.

The same reasoning will apply when the liens are more than three. Increase them *ad infinitum*, and the rule applicable to all such cases is the same.

Let us now consider a somewhat different case:

O conveys the absolute legal title of Blackacre to A by deed unrecorded. Afterwards A conveys the same land by deed of record to B, who has notice of A's deed; and then again by deed of record to C, who has notice of B's deed, but no notice of A's. This only differs from the former case in that the deeds are absolute, and not deeds of trust.

This case is without difficulty. A's *legal* title is valid against B, and B takes no legal title at all. C's notice of B's deed is therefore only notice of what in legal effect is a nullity. But C's deed, without notice of A's unrecorded deed, becomes paramount, because A's deed is void as to C. C takes the legal title of A, of which A cannot complain, for his forfeiture is due to his own laches, by which C was deceived. Nor can B complain that C gets the title from A; for C thus takes nothing from B, and nothing to which B had or could have any claim. He takes what the law gives him; and B's void deed is thus left to its fate, as a nullity. B cannot say that C did it, for the *law* did it.

And this result is more obvious, because if C was excluded from taking A's title, void as to him by law, then A's title would be validated *against* law. And if an objector should still contend that C's title obtained from A should be transferred to B, because B claims under a deed of which C had notice, then it would result that A's title, valid as to B by law, and void as to C by law, would, in the teeth of that law, be made void in effect as to B and valid as to C; which is *reductio ad absurdum.*

Analogous reasoning will solve the cases where some of the contestant claims are judgment liens; though as to these we must observe that, as they are not acquired by contract but exist by act of law, the question of notice is in such cases eliminated. For this reason, while an unrecorded deed is void as to purchasers for value without notice, it is void as to creditors with or without notice; and to a creditor by judgment the law of Virginia gives a lien on the debtor's land, though he has notice of a prior unrecorded deed. Such deed is void as to such judgment creditor.

The New Jersey case of *Hoag v. Sayre,* cited from 6 Stewart's Reports (s. c. *The Reporter,* Aug. 3, 1887) by Col. Pendleton in *Virginia Law Journal,* June, 1888, p. 424, was thus stated:

H. took chattel mortgage, unrecorded, in December, 1877. On February 14th, 1878, F. took a second mortgage on same chattels with notice of H.'s prior mortgage. S. on February 27th, 1878, obtained judgment and levied on the chattels mortgaged by the two deeds. It seems that the second mortgage was recorded, and therefore was good against the judgment creditor.

Beasley, C. J., held that the judgment took the place of the first mortgage to the extent of the privilege it had over the second mortgage, but no further. And upon the facts, as above stated, his reason-

ing shows that as to the residuum of the judgment debt, after taking out the amount of the first mortgage, the judgment creditor was postponed to the second mortgagee.

This decision is in accordance with the views already maintained, in cases which only differ from the New Jersey case in the fact that in the latter the third lienor is by judgment, and not by deed of trust or mortgage.

The case of *Hill v. Rixey*, 26 Gratt. 72, followed in *Eidson v. Huff*, 29 Gratt. 338, seems to conflict with the views above presented. It was a case of contest between the liens of two judgments and a deed of trust subsequent to both.

In substance the facts were these: Rixey had judgment in 1860, legally docketed in 1868. Wayland had judgment in 1861, legally docketed in 1866. Turner had deed of trust in 1865, legally recorded in 1867.

Docketing has no effect as between judgments, the liens of which avail in order of time. But an undocketed judgment is void as to a purchaser for value without notice, and the claimant under the deed of trust in this case was such a purchaser. *Rhea v. Preston*, 75 Va. 757.

R.'s undocketed judgment was valid against W.'s subsequent judgment, but was void as to T.'s deed of trust.

W.'s judgment was subordinate to R.'s undocketed judgment, but was valid against T.'s deed of trust.

The opinion of the court in the case does not clearly define the distribution of the fund. One of the counsel in the case has kindly sent me a copy of the decree and its practical result. I have a copy of the record.

The Circuit Court had ordered the fund to be disbursed as follows:

First—To pay Rixey's judgments, which was first in time, but undocketed.

Second—To pay Wayland's judgments, second in time, but docketed.

Third—To pay debts secured by deed of trust to Turner subsequent to all the judgments, and recorded.

The Court of Appeals reversed the Circuit Court, and decreed that Rixey had no priority over the deed of trust; that the Wayland judgments had priority over the deed of trust, and must be first satisfied out of the fund; and, if any surplus remained, then the creditors by deed of trust must be paid; and the residue to the Rixey judgments.

I am informed by counsel that the fund did not suffice to pay the

Wayland judgments, and the deed of trust creditors and the Rixey judgments got nothing.

Judge Staples gives his reasons for his decision in this sentence:

"A judgment creditor may lose his lien as against a purchaser by a failure to docket, and a subsequent creditor to him may preserve his judgment lien against the same purchaser by a prompt compliance with the statute. In such case the purchaser takes precedence of the prior, though not of the subsequent judgment."

This case is not in accord with the views taken in the solution of the legal puzzle in the previous part of this article. The writer feels that in controverting the decision in *Hill v. Rixey* he is liable to the charge of presumption; but, with profound respect for the court and for the very able judge who pronounced its judgment, he ventures to show that the decision should not overthrow the views he has already maintained.

In the first place, the point was not made or argued, and does not seem to have occurred to the court. In fact, the parties before the court did not admit of a decision on the point.

The bill was filed by Rixey to enforce the liens of his judgments, making the creditors by the deed of trust defendants. The decree directed the report of liens on the land, and in the report the creditors by docketed judgments were reported as subsequent lienors to Rixey's judgments, but as prior to the deed of trust creditors. It was only in this way that the creditors by docketed judgments were before the court at all.

Hill, a creditor under the deed of trust, appealed, and made as appellees Rixey and others, but not one of the docketed judgment creditors; and in his petition he did not allege as error the precedence given to the docketed judgments, but only the priority given to the undocketed judgments of Rixey over the deed of trust. The question of precedence between the docketed judgment creditors, the undocketed judgment creditors and the deed of trust could not and did not arise; and without the docketed judgment creditors being before the court, could not be decided by the court. The only question was, whether Rixey's undocketed judgment could have precedence of the recorded deed of trust; and that the court decided in accordance with the views presented in the solution of the puzzle. The court left the precedence of the docketed judgments where the Circuit Court put it, and only subordinated the Rixey judgment to both; without consid-

ering what should be done for the deed of trust creditors in relation to the docketed judgments.

The writer undertakes now to show that the court failed to do full justice by its decree, because the proper parties were not before it, and the point was not made in the petition of appeal for the court's decision.

The court decided that the deed of trust was entitled to priority over Rixey's undocketed judgments. That was right. But by the result of its decision it postponed Rixey's prior judgments to the subsequent docketed judgments. That was wrong. Before the deed of trust was executed Rixey's undocketed judgments had precedence of the docketed judgments. How could their validity as to these last be nullified by the fact that they were void, because undocketed, as to the deed of trust? Because void as to the deed of trust, are they void as to subsequent judgments? Clearly not. And yet such was the result of the decree. The fund did not reach any but the docketed judgments. How could it reach them at all, and exclude Rixey, as to whom the docketed judgments were subordinate? The decision made Rixey's judgments void as to the docketed judgments, because they were void as to the deed of trust? Clearly that is a *non sequitur*.

But it may be objected, how could the court give the fund to Rixey, in preference to the docketed judgments, when Rixey's judgments were void as to the deed of trust, which itself was void as to the docketed judgments? That is the puzzle! How shall it be solved? The answer is, *by giving every part of the law its full effect.*

Give to Rixey *tentatively* his judgment debts. Can Wayland (the docketed judgment creditor) complain? Clearly not. R. is paramount to W. But T. (representing deed of trust creditors) can say to R., your claim is void as to me. To the question, "How is it to be avoided?" the answer is clear: by giving to T. what R. takes tentatively. Can R. complain of this? Clearly not. Can W.? As clearly not. T. can say to him, as in the case of the puzzle, "Friend, I do thee no wrong. I only take what R. had right to preferably to thee; and what thou couldst never have had right to against him. I take nothing of thine—only what is not, and could not be thine, even if I did not take it from R.; and I take it from R. by legal forfeiture of his right to me because of his laches, by which I was deceived."

The solution proposed for the puzzle is therefore a just solution for *Hill v. Rixey*, in which, as has been shown, the question was not raised, and could not have been decided for want of parties. The

error in the decision of that case, as it resulted, was, that while it recognized the forfeiture of Rixey's priority to the deed of trust, it failed to recognize the subordination of the docketed judgments to Rixey; and hence failed to give to the deed of trust creditors, Rixey's precedence to the docketed judgments, as the just and legal consequence. The solution proposed validates Rixey's claim, as to whom Rixey was guilty of no laches, but avoids it as to the deed of trust as to which he was guilty. Thus, no jot of right is taken from any, no tittle of right is given to any, except as a consequence of the registry laws. In the vindication of these laws all rights are conserved.

Without reference to any other case, I ask to be excused for the prolixity of this article.

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